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ABSTRACT

Summarized are data on the implementation of due process procedures for handicapped children in Massachusetts. Presented is an analysis of due process hearing characteristics, including number of appeals, characteristics of children and parents, and the types of persons involved in hearings. Implementation problems are seen to include selection of hearing officers, legal issues, and the adversarial nature of the hearings. Strategies and solutions adopted by The Massachusetts Department of Education are listed, including the development of standards to guide the hearing officer in reaching a decision. Listed are recommendations outlining the key decisions for states regarding P.L. 94-142, The Education for All Handicapped Children Act. (CL)

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THE IMPLEMENTATION OF DUE PROCESS IN MASSACHUSETTS

A Summary and Recommendations for State and Local Education Agencies

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PREFACE

This is a summary of a policy paper on the implementation of due process procedures in Massachusetts. The paper was developed by the Massachusetts Education Policy Fellowship Program and was jointly sponsored by the Massachusetts Department of Education and the Bureau of Education for the Handicapped. The paper addressed data collected since 1974 when due process procedures in special education were implemented.

NASDSE is indebted to Carol Kervick, Director of Massachusetts Bureau of Appeals, and Thomas Schultz, Harvard Graduate School of Education, authors of the original policy paper, for their assistance and cooperation in allowing NASDSE to disseminate this information.

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Characteristics of Hearings

1. Number of Appeals

Time period	Appeals	Hearings	Mediated Agreements	Pending or Withdrawn
9/74 to 8/75	260	71	106	83
9/75 to 8/76	522	135	137	250
9/76 to 2/77	250			

2. Critical Issues

- In 90% of the cases, there was no disagreement as to the handicapping condition of the child in question
- In a majority of cases, there was major disagreement over the severity of the handicapping condition and the consequent needs
- Approximately 40% of the cases involved a dispute as to placement and involved, in every instance, the parents requesting a private school placement
- The remaining cases, approximately 60%, related to the appropriateness of programs within the public school
- The trend of the appeals appears to be from parents requesting more specialized and expensive treatment than the public schools considered appropriate

3. Characteristics of Children and Parents

In an analysis of 225 cases in which a full hearing was conducted:

- 66% of the children were categorized as learning disabled and 15% as emotionally disturbed
- 75% of the children were male and 25% female
- The distribution of age:

3-5	3.5%
6-11	42.2%
12-13	24.9%
14-17	25.4%
18-21	4.2%

- The staff impression was that parents who were involved in these appeals were "overwhelmingly middle and upper income whites". It is estimated that less than 5% of the appeals involved minority or low income parents.

4. Individuals Involved in Hearings

- The public schools were generally represented by from six to eight people (the Director of Special Education, four or five key staff, and one or two teachers)

- In private school placement issues, the parents would usually bring several representatives from the private school (evaluators and supportive witnesses)

- Half the parents and half the schools used attorneys. The appearance of an attorney seemed to have little impact on the results of the hearing.

5. Analysis of Formal Hearings

- Hearings averaged six to eight hours, with six to ten people testifying. An average of 60 pages of written evidence was presented.

- In the first 225 decisions, approximately 47% favored the public school and 52% favored the parents.

- As of June, 1977, 110 cases had been appealed to the State Advisory Commission by parents. Eighty-five percent of these appeals upheld the decision of the hearing officer. Forty-five cases had been further appealed to the state court, 30 by the public schools and 15 by the parents.

- For parents, the costs of lawyers and specialists ran as high as $4000. The average cost of a lawyer was $800 to $1000.

- Minimal expenses to the school system included the cost of substitutes, the preparation of written material, and staff time. In addition, the schools incurred attorney's fees of up to $8000 per hearing, with an average of $800 to $1000 in attorney's fees.

Implementation Problems

1. Hearing Officer Selection

An early staffing problem was the issue of qualifications of Hearing Officers. Initially, individuals with special education backgrounds were selected and provided inservice training in legal procedures. However, certain problems were encountered with this approach.

a) Biased decisions--the Hearing Officer would seldom decide a case on the evidence, but rather on the basis of his own educational theory.

b) Legal mistakes--In several instances, the Hearing Officer failed to ask a question since the answer was known to him and then, in the decision, he would cite this material as "an already known fact" even though it was not in the evidence.

c) Failure to control the hearing--there was a tendency for Hearing Officers to be intimidated by attorneys. Tactics employed on non-educational matters during a hearing tended to confuse, obstruct, and hinder a natural and orderly educational hearing process. It also seemed that additional inservice legal training tended to increase this deference to lawyers.

2. Legal Issues

It became very difficult to develop standards to assess appropriate educational placements, to choose between parent proposals and public school system proposals, as to treatment plans, and to determine what evidence was relevant to these issues. As an example, it was not clear whether "appropriate" meant minimal services or optimal services.

3. Adversarial Nature of Hearings

The most basic flow appeared to be that the hearing intensified the antagonism between parents and school officials. A survey conducted in 1976 found the following:

a) prior to the hearing, due to a series of frustrating problems, parents felt apprehensive and unsure about the process

b) during the hearing, parents reacted to the legal procedures and language. As a result of the tense atmosphere parents often omitted important information in their testimony.

"Even though it was supposed to be informal, when they said stuff about subpoenas and transcripts and witnesses, I was very scared. I though it might be like the trials in the movies."

c) after the hearing, parents report that they resented being cross-examined under oath by an attorney. Indeed, 45% of the parents felt that the experience was so traumatic that they would not go through it again under any circumstances.

Strategies and Solutions

The Massachusetts Department of Education implemented the following changes to improve the quality and effectiveness of due process hearing procedures:

- to improve the quality of decision-writing, an SEA review of each hearing decision prior to its release was made to check for legal soundness and clarity.

- In addition, a full-time scheduler was hired to arrange hearing dates and inform participants; a management information system was developed to record and analyze information on all appeals, and a procedures manual for hearing officers was prepared.

- In order to determine appropriate placement, hearing officers have developed a series of questions to guide the assessment of the educational plan:

  1. What is the difference in findings of the independent evaluation, and the school assessment? How does the school define success, and how does the parent define success?

  2. What types of programs are offered to similarly handicapped children, to less severely-in-need children, and to more severely-in-need children?

  3. How have those programs fared, and what is the prognosis for success of the program designed for the child in question?

  4. How has the child fared in the public school in the past and what are the differences between the proposed program and the program offered in the past?

- Standards have been developed to guide the hearing officer in reaching a decision:

  1. Whether the plan was developed in accordance with the procedures set out in state regulations

  2. Whether the child's special need was correctly identified, based on sufficient evaluation

  3. Whether the conclusions of the evaluation team demonstrate the information and criteria on which they were based.

4. Whether the educational plan specifically addresses the needs found by the evaluation team.

5. Whether the educational plan includes specific goals and objectives and provides criteria for evaluating three-, six- and nine-month goals.

6. Whether the parents participated in the development of the plan.

7. Whether the school is capable of implementing the plan.

8. Whether the plan is flexible and capable of modifications.

- In recruiting Hearing Officers, persons with a legal background and preferably also a background in the problems of handicapped children were sought out. The training needs of such personnel are now being met through inservice programs on decision-writing and the conduct of hearings, as well as workshops on testing practices, terminology and program options for serving special needs children. Attorneys, school personnel, and parent groups are far more satisfied with this staff than with the former staff.

- To reduce the costs of adversarial hearings, the Department of Education gave greater emphasis to a mediation process prior to the formal hearing.

Recommendations to States and LEAs

Massachusetts Department of Education has struggled with the problem of applying due process procedures in special education for three years and has designed what appears to be a sensible working system for that state. However, it is not at all clear that the Massachusetts model would be relevant and appropriate in all states. For example, the SEA was able to recruit lawyers as hearing officers because of a temporary oversupply of lawyers in our region. This condition may not occur in other states. Therefore, the following is a list of recommendations which outline the key tasks and decisions for states in preparing for P.L. 94-142. The strategies and lessons of the Massachusetts experience are summarized within that format:

SEA Level

1. States must first examine their own state law relating to special needs children to see if it provides for due process procedures. If it does not provide for these procedures, it will have to be changed, either by legislative amendment or state regulation. Also of importance is an examination of state law relating to the administrative hearing process. Most states have an Administrative Procedure Act which must be followed by agencies in conducting hearings.

2. The state agency should attempt to anticipate the level of appeals by assessing the agendas and tone of parent organizations and advocate groups. Other important factors to consider are the level of sophistication and quality of services delivered by most schools, and the extent of excluded or institutionalized children who could return to public school responsibility. This assessment is relevant to issues of staffing levels, training, and the need for informing parents and school personnel on due process procedures.

3. Each state must determine the agency to receive initial parent appeals. Hearings may be conducted by the state, intermediate, or local education agency. States may choose to utilize local education agency staff as parttime hearing officers. SEA rejected that option not only because of management problems of part-time staff (scheduling, training and consistency of decisions) but also because it seemed inevitable that LEA employees would be perceived by parents as biased. Since the hearing process is designed to compensate for the inherently unequal bargaining power of the parent when negotiating with the school, the perception of impartial hearing officers is crucial to maintain.

4. In terms of a due process model, we would urge other states to consider the advantages of an informal mediation stage in their process. While the mediation process does not eliminate the need for formal hearings, it clearly serves to screen out the majority of complaints which can be resolved at a lower, less costly level. The hearing process is reserved for the smaller number of cases where polarized differences exist between parents and LEA, or for persistent problems which indicate a need for clearer policy at the state level.

5. Another key decision is determining hearing officer qualifications, including training and education. States must decide whether they will be full or parttime personnel. States may wish to reorganize their staff to establish the hearing officer as a perceived impartial agent. Strict job descriptions and a code of ethics may be desirable. The narrative section of the paper related BSEA's reasons for turning to lawyers as the chief source of hearing officers because their training allowed them to control the hearing process, avoid reversible errors in decisions, and carry out procedures swiftly and fairly. However, in recruiting staff for positions of mediator, the SEA found group processes skills and familiarity with education and human services to be more valuable than legal training.

6. Staff training programs should include: legal training in the substance of P.L. 94-142 and the more general concepts of administrative law, attitudinal training (the concept of impartiality and the need to operate at a low-key level), training in special education terminology, testing and program development, and evaluative practices. The SEA has found role-playing, and the use of video-tape to be useful in simulating the atmosphere of a hearing setting.

7. Training for participants should include representatives of parent groups, school personnel, and lawyers to prepare all actors in their expectations and skills. Rights, procedures, and intent of the due process procedures should be presented. Sample decisions, demonstration hearings, and simulations are some of the techniques which could be used.

8. Case management systems must be developed to insure compliance with state time lines, adequate control and storage of evidence submitted at hearings, ease of access for parents, and a uniform system of granting postponements. States should determine whether decisions will be publicized, and if so, what must be done to protect the confidentiality of the child.

9. Finally, the issue of non-compliance with a decision must be addressed. The relationship of the state to the intermediate

or local educational authority must be examined to determine whether the Department of Education has monitoring capacity. Does the state have the capacity to enforce a hearing officer's decisions against a reluctant local system?

LEA Level

The lessons of Massachusetts can be most useful as suggestions for preventive strategies at the local level. In most cases, it would appear to be in the LEA's interest to avoid compliants which escalate to the level of formal hearings. The Massachusetts cases suggest that while many appeals are caused by a lack of agreement on "appropriateness", an equally weighty factor in parents' minds is simply how they are treated by LEA staff and administrators. This suggests a preventive strategy of establishing early, regular, non-threatening and non-condescending communication with parents. Additionally, since the critical meetings for sparking/allaying parental complaints are the assessment and educational plan presentations, it would seem beneficial for participants in those sessions to receive special training in how to include and respond to parents.